Supreme Court, U.S.
FILED

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94-65 JUN 10 1994

No. ____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

GYORGY FODOR,

Petitioner

v.

TIME WARNER, INC., WARNER COMMUNICATIONS CO., WARNER BOOKS, INC., WARNER BROTHERS, INC., JACK MEREK, DENNIS ANDERSON

Respondent

On Appeal from the
United States Court of Appeal
for the Ninth Circuit

PETITON FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the ruling of the U.S. Ninth Circuit Court of Appeals is violative of Article I, Section 8[8] of the U.S. Constitution when it disregarded the mandate of 17 U.S.C. 410(c) and 17 U.S.C. 101 in refusing to recognize that Petitioner's Certificate of Copyright Registration did establish a "prima facie" case for his priority of authorship, and that Defendants' Certificate of Copyright Registration was a "prima facie" evidence proving the falsity of their claim of prior independent creation when Petitioner's Copyright Certificate issued in October 1987 with the attendant date of creation being 1987, and while Defendants' allegedly infringing work carries a Copyright Certificate issued in February 1989 with the date of creation

being 1988 and no attendant claim of prior registration nor any other claim that the work is derivative or a compilation affixed within Defendants' Copyright Certificate?

II. Whether it is a denial of Petitioner's Due Process rights as guaranteed by the Fifth Amendment of the U.S. Constitution, and a real and embarrassing conflict of opinion and authority among U.S. Courts of Appeal under 17 U.S.C. 501 in that the U.S. Ninth Circuit Court of Appeals affirmed on "de novo" review, the District Court's granting of Summary Judgment to Defendants based upon their claim of prior independent creation, even though Petitioner (the non-moving party) undisputedly established under three different theories his "prima facie" case of copyright infringement and,

furthermore, documented that much of Defendants' material evidence was back-dated, forged, and otherwise fabricated in order to support their claim of prior independent creation?

III. Whether it is a denial of Petitioner's Due Process rights, as well as disregard of the Public's right to an independent Federal Judiciary under Article III, Section 1 of the U.S. Constitution, when the U.S. Ninth Circuit Court of Appeals disregarded and refused to consider overwhelming evidence which, under the standard of "de novo" review, proved that the District Court's Judgment and Orders granting Defendants' Summary Judgment were not decided by the District Judge, and that the Judge's signatures on said Judgment and Orders were forged with the use of his rubber-stamped facsimile signature, and whether the Ninth Circuit

Court's affirmance of said Judgment and Orders, secured by fraud perpetrated upon the U.S. District Court, will erode the Public's confidence in the independence of the Federal Judiciary?

LIST OF PARTIES
RULE 29.1 LIST

The parties to the proceedings below were the same parties named in the caption of this Petition. Petitioner Gyorgy Fodor is an individual, and has neither a parent corporation nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW iii

LIST OF PARTIES
RULE 29.1 LIST vii

OPINIONS BELOW ....

STATEMENT OF JURISDICTION ....

STATUTES AND CONSTITUTIONAL
PROVISIONS INVOLVED ....

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 14, 18
36

CONCLUSION 47

APPENDIX ....

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES:

Anderson v. Liberty Lobby, Inc.,
477 US 242 at 255,
91 L.Ed 2d 202, 106 S. Ct. 2505 23

Hazel-Atlas Glass Co. v.
Hartford Empire Co.(1944)
322 U.S. 238, 246, 64 S Ct 997,
88 L.Ed 1250 45-46

Hurtado v. California,
110 U.S. 516, 535,
4 Sup Ct. 1111, 28 L.Ed. 232 35

Northern Pipeline Co. v.
Marathon Pipe Line Col.
458 US 50, 58,
73 L. Ed. 2d 598 46

Reckarey v. U.S. 495 U.S. 944 38

Steel Co. v. Cambria Iron Co.
22 S Ct. 698, 185 U.S. 403,
46 L Ed 968 32

Truax et al v. Corrigan, et al.
42 Sup. Ct. 24 at 129 35

FEDERAL COURT OF APPEALS CASES:

Baxter v. MCA, Inc., 812 F.2d 421
at 423 (9th Cir. 1987) 20,
23-24

California Pacific Bank. v.
Small Business Adminstration,
1977, 557 F 2d 218 Page 222 44

Jeweler's Circular Pub. Co. v.
Keystone Pub. Co. (1922)
281 F 83, cert. den.259 US 581,
66 L Ed 1074, 42 S.Ct. 464 24

Lawrence v. Dana (CC Mass)
F Cas No 8136 24

Reyher v. Children's Television
Workshop, 533 F.2d 87, 90
(2d Cir. 1976), cert. denied,
429 U.S. 980, 97 S. Ct. 492,
50 L.Ed. 2d 588 (1976) 19

Roth v. Pritikin (1983)
710 F 2d. 934 35

Sid & Marty Krofft Television
Productions, Inc., v.
McDonald's Corp., 562 F.2d 1157,
1162 (9th Cir. 1977) 19 20

Universal Athletic Sales Co. v.
Salkeld, 511 F.2d 904, 907 (3rd.
Cir.1975), cert. denied, 423 U.S.
863, 96 S.Ct. 122, 46
L.Ed. 2d 92 (1975) 19

U.S. v. Barbarra,
1971 442 F 2d 517 at 522 26-27

U.S. v. Marino
(1981) 658 F.2d 1120 28

Page

U.S. v Palow, 777 F.2d 52 (1985) cert. den. 475 U.S. 1052 89 L.Ed.2d 585, 106 S.Ct.1277) 28-29

U.S. v. Fernandez 892 F.2d 976 38

CONSTITUTIONAL PROVISIONS:

Fifth Amendment of the U.S. Constitution 35, 41

Article I, Section 8, U.S. Constitution 14

Article III of the U.S. Constitution 45-47

FEDERAL STATUTES:

17 U.S.C. 410(c) 2, 14 16

17 U.S.C. 101 .... 2, 14 16

17 U.S.C. 501 ii

18 U.S.C. 371 10

28 U.S.C. 1338(a) 1

28 U.S.C. 1338 (b) 1

	Page
FRE 406	11, 12 40, 44
FRE 801(d)(2)(A) and (B)	27, 28
FRE 901(b)(4)	44
FRE 1008	30
FRCP 60(b)(3)(4)	9

TREATISES:

2 Nimmer on Copyright 141 at 610 - 611 (1979)	19-20
Nimmer On Copyright, Volume 3, 1993, 13.01 {B} 13-12 and 13-13	22
The Almanac of the Federal Judiciary, 1992 Volume I, Page 52	40

LOCAL RULES

Local Rule 32	6, 40-41
Local Rule 11.1.2	5

October Term 1994

No. ____________________

GYORGY FODOR,

Petitioner

v.

TIME WARNER, INC., et al.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

GYORGY FODOR, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit, entered on the above-entitled case on March 2, 1994.

[illegible]

[illegible],

[illegible]

v.

[illegible], et al.,

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix hereto at Page A-1.

STATEMENT OF JURISDICTION

The unpublished Memorandum of the Court of Appeals was entered on March 2, 1994, a Petition for Rehearing with the suggestion of appropriateness of rehearing en banc was denied on April 21, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutory provisions:

17 U.S.C. §101
17 U.S.C. §410
17 U.S.C. §501

These statutes are reproduced in the Appendix hereto at A-38 and A-39.

Also cited herein:

Fifth Amendment, Article I, Section 8 and Article III of the United States Constitution. Those Constitutional provisions are reproduced in Appendix, Pages A36 and A37.

STATEMENT OF THE CASE

Petitioner brought this action in the Central District of California on May 2, 1990, invoking federal jurisdiction for Copyright Infringement under 28 U.S.C. 1338(a) and federal jurisdiction for the State's Unfair Competition claim under 28 U.S.C. 1338(b).

Petitioner filed his First Amended Complaint on July 23, 1990, setting forth new charges that Defendants Time Warner Inc., et al. had produced, during discovery under oath, a large volume of forged, fabricated, and back-dated documentary evidence and also proffered perjurious testimonial evidence to support their created claim of "prior independent creation."

To support his case, Petitioner firstly relied upon the best evidence available, the Certificates of Copyright

Registration for his and Defendants' work. Petitioner's Copyright Certificate was registered in October 1987, with the date of creation being 1987. Defendants' Copyright Certificate was registered in February 1989, with the date of creation being 1988 and no indication within the Certificate that the work so copyrighted was "derivative" or a "compilation" of any earlier work. Under 17 U.S.C. 410(c) and 17 U.S.C. 101, Petitioner argued his Certificate of Copyright mandatorily and unconditionally sustained his priority of authorship and the falsity of Defendants' claim of prior independent creation.

To support his case, Petitioner also documented Defendants' undisputed access to his work one year prior to Defendants' publication of their allegedly infringing work. He also documented a probative number of substantial similarities

between the two works, which even included the undisputed occurrence of common errors.

To support the allegations of false evidence, Petitioner documented, among numerous problems, gross inconsistencies in the deposition of Defendants' putative author, including his inability to explain the existence of the common errors between his alleged work and Petitioner's. Petitioner also documented Defendants' inability to resolve their alleged date of creation (1986) with either their Copyright or other critical documentary evidence they had submitted under oath, including a newspaper article which indicated the putative author had first found the premise for his work in 1988.

On January 3, 1991, the U.S. District Court denied Defendants' Motion

for Summary Judgment which they had based upon the argument of "prior independent creation" . The District Court found "substantial" similarities and access to Petitioner's work one year prior to publication of Defendants' work (Appendix A-11). A few days later, the District Court set trial for September 1991. Within days, Defendants moved for Reconsideration based on the same argument of prior independent creation, based on the same allegedly manufactured evidence.

On July 10,1991, Defendants moved for a second Summary Judgment, also based on the same elements as before. On July 29, 1991, Petitioner filed for Partial Summary Judgment, seeking summary adjudication on the matter of prior independent creation, based on the clear falsity of certain banking documents

which Defendants had produced to further buttress their claim of prior independent creation. Banking documents submitted by defendants included a check of payment to their putative author for over $60,000.00. According to Defendants' own records, the funds were credited to the author's bank account the day before he purportedly brought it in for deposit, according to the various bank stamps. In deposition, the bank's Custodian of Records testified the transaction was impossible to explain. Petitioner's banking expert also so testified in deposition.

On August 14, 1991, a Minute Order -- unsigned by the District Judge -- continued the trial date to November 1991, in violation of Local Rule 11.1.2. requiring such continuances be approved in writing by the Judge. Instead, the

Minute Order was approved in writing by a Clerk.

On October 21, 1991, an Order vacated the November trial date, in violation of Local Rule 11.1.2.(A-41), requiring such Orders be approved in writing by the Judge. This Order bore only a rubber-stamped facsimile signature of the Judge.

On August 31, 1992, the U.S. District Court apparently reversed itself, granting Time Warner's Motion for Reconsideration and granting Summary Judgment. The Judgment came 570 days after the Motion for Reconsideration had been filed, 450 days beyond the legal time limit set by Local Rule 32.

Furthermore, the Judgment and the accompanying Order (Appendix Pg. A-17) and Statement of Uncontroverted Facts and Conclusions of Law were not hand-signed by the Judge as required by law, and is

the Court's custom and practice. They were all rubber-stamped with the Judge's facsimile signature. This is the first time in the case at bar and in any other case in the Central District of California wherein a substantive Order or Judgment is not hand-signed by a Judge, according to extensive research of the District Court files by Petitioner's attorney.

On September 14, 1992, Petitioner filed a Notice of Appeal with the Ninth Circuit.

On November 9, 1992, the U.S. District Court sanctioned Petitioner, ordering him to pay Defendants $169, 587.50 for his failure to admit the authenticity of Defendants' documentary evidence. The Order was not hand-signed by the Judge, but rubber-stamped with his facsimile signature, with no

opportunity to appear and be heard allowed.

In January 1993, Petitioner filed a Writ of Mandamus in the Ninth Circuit, seeking to void the Judgment and Orders, arguing Denial of Due Process based upon a series of failures of the District Court's procedural Due Process protections which allowed Defendants Time Warner, et al., to decide the case in their favor and further to oppress Petitioner by attempting to extort fees in wild excess of any monetary awards ever granted in copyright cases (for a discovery motion), all without benefit to Petitioner of any appearance or hearing in open court. The District Judge was personally served with a copy of the Writ in his chambers.

The Ninth Circuit Court of Appeals denied the Writ. The District Court remained silent.

On March 5, 1993, Petitioner filed the Opening Brief of his Appeal, which raised the above issues of Denial of Due Process and Fraud upon the Court. The District Judge was served with a copy of the brief in his chambers.

In May 1993, Petitioner attempted to appear before the U.S. District Judge by filing a Rule 60(b)(3)(4) Motion, claiming fraud upon the Court and seeking to void the Judgment and Orders.

On June 17, 1993, the District Court issued an Order denying a hearing on the Rule 60 Motion with another rubber-stamped facsimile signature of the Judge.

On June 23, 1993, Petitioner filed another Petition for Writ of Mandamus

with the Ninth Circuit, seeking an Order to direct the District Court to have an open court hearing on the Rule 60 Motion, arguing it was indispensable for Petitioner's Due Process rights. The District Judge was personally served with a copy of the Petition in his chambers. The Ninth Circuit Court of Appeals denied the Writ. The District Court remained silent.

On July 23, 1993, Petitioner filed with the Ninth Circuit a Petition for Rehearing with Suggestion of Appropriateness of Rehearing en Banc. The Petition for Rehearing, on Page 8, Paragraph (d), states:

> "When these tactics failed, Time Warner apparently conspired to impede, obstruct and defeat lawful functions of the District Court, delayed the ruling on a motion for 570 days, causing the District Court to reverse itself and then causing an award to

> themselves, for a discovery motion, for attorneys' fees in the amount in excess of $169,000.00. This violated the Fifth and Eighth Amendments of the Constitution and several sections of 18 U.S.C. 371 and other criminal offenses."

The Petition was also personally served on the District Judge in his chambers. The Ninth Circuit denied the Petition. The District Court still remained silent.

On December 2, 1993, Petitioner was again sanctioned, this time in the amount of $250.00 a day for his refusal to admit the legitimacy of the District Court's non-signed Order and Judgment. The Order to pay sanctions carried a rubber-stamped facsimile signature of a Federal Magistrate in the Central District and came without any opportunity to appear or

> [illegible]

[illegible]

[illegible]

to be heard in open court, though requested.

On February 2, 1994, the case was argued before the Ninth Circuit Court of Appeals. Many of the allegations of judicial improprieties were reviewed, along with the merits of the Copyright Infringement and Unfair Competition claims.

Petitioner's attorney argued that pursuant to Federal Rules of Evidence, Rule 406, Habit, Routine and Practice, there is highly persuasive evidence that the above-described actions of the U.S. District Court could not have been executed by a Judge, but by Time Warner, in conspiracy with his Clerk(s). One of the Appellate Judges, in questioning Defendants' attorney, observed that some of the writing within the Order granting Defendants their Summary Judgment Motion

[illegible]

[illegible]

[illegible]

read as if it had been written not by a Judge but by a lawyer, "to the Court" not "by" the Court.

Nonetheless, on March 2, 1994, the Ninth Circuit Court of Appeals affirmed the District Court's Dismissal of Petitioner's Copyright Infringement and Unfair Competition claims. As to the matter of the enormous attorneys' fees, the Appeals Court ruled , "Fodor appears to have a colorable claim that he denied the authenticity of some of the banking documents in good faith, based upon the opinion of his expert..." and in its unpublished Memorandum states, "Moreover, we remand the attorney's fees for reconsideration of the amount awarded."

In essence, the Appeals Court concedes there might be legitimacy to Petitioner's denial of the authenticity of Defendants' evidence yet rather than

remand the case for resolution by a jury, the trier of fact, instead seeks to punish Petitioner by continuing to allow the District Court to set sanctions against him ($250.00 per day). Furthermore, this ruling forces Petitioner back into the same courtroom that has been seriously compromised by Defendants and is operating contrary to the law regarding Due Process protections.

Petitioner filed for Rehearing with Suggestion of Appropriateness of Rehearing en Banc. The Petition was denied by the Ninth Circuit on April 21, 1994.

REASONS FOR GRANTING THE WRIT

I. "TO PROMOTE THE PROGRESS OF SCIENCE AND THE USEFUL ARTS, BY SECURING FOR LIMITED TIMES TO AUTHORS AND INVENTORS THE EXCLUSIVE RIGHT TO THEIR RESPECTIVE WRITINGS AND DISCOVERIES." (ARTICLE I, SECTION 8, U.S. CONSTITUTION.)

The securing of exclusive rights to an Author is achieved by - inter alia - the mandate embodied in 17 U.S.C. 410(c) and 17 U.S.C. 101. The willful disregard of the plain and mandatory language of the above statute by the Ninth Circuit, denied to this Author, the Petitioner, the rightful benefits to his Writings as guaranteed by the U.S. Constitution by deciding the prior creation issue (a factual issue) in Defendant's favor.

Petitioner secured his Copyright Registration Certificate in October 1987 which affixes the date of creation in 1987.

Defendants Time Warner Inc. et al. secured their Copyright Registration Certificate in 1989, affixing the date of creation in 1988 with no indication of any prior registration nor any indication that the work was a derivative or a

compilation of any other, earlier work. Given the myriad of questions about the authenticity of most of Defendants' evidence, it should be noted that the two Copyright Registrations were on file with the United States Library of Congress well before the onset of litigation and, hence, are among the most probative, independently verifiable pieces of evidence in existence.

> "In any judicial proceedings, the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." (17 U.S.C. 410(c))

> "A work is 'created' when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work." (17 U.S.C. 101)

> "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." (17 U.S.C. 101)

The language of the statute is plain and mandatory. The Ninth Circuit's finding that Defendants' Certificate of Registration is consistent with their claim of creation one year prior to Petitioner's is a blatant and willful disregard of the mandate of the law.

Petitioner's Certificate of Copyright attests the prima facie evidence of the priority of his authorship while Defendants' Certificate attests the prima facie evidence that their claim of earlier independent creation, purportedly predating Petitioner's by one year, is a fraud.

The specificity of the Copyright Law is of crucial importance to the public interest. The U.S. Constitution guarantees authors the right to their works exclusively but for a limited time, after which the public can freely benefit from the works of authors and inventors, and the progression of Science and the Arts. However, if during the limited time of exclusive rights, an Author cannot claim the protection of Law, then plagiarists, infringers and thieves can freely take whatever they please. Authors will be forced into other occupations, unable to earn any living with their writings. Ultimately, the public will pay the price and society will suffer.

II. THE NINTH CIRCUIT HAS DENIED PETITIONER DUE PROCESS AND IN SO DOING HAS CREATED AN EMBARRASSING CONFLICT OF OPINION AND AUTHORITY NOT ONLY WITHIN THE CIRCUIT ITSELF, BUT ALSO BETWEEN THE CIRCUIT AND OTHER COURTS OF APPEAL.

Petitioner established a prima facie case for his claims based not only on the undisputed ownership of a valid copyright, but also on issues of undisputed access, substantial similarity and the undisputed occurrence of common errors (two) between his work and Defendants'. The U.S. District Judge in denying Defendants' First Motion for Summary Judgment so ruled based on findings of both access and substantial similarity (Appendix Pg.A-11).

Circuit Judge Tang, who authored the Memorandum in this Appeal (Appendix, Pg. A-1), also understands the mandate of the law as amply demonstrated in an opinion he authored in 1987. "To establish a successful claim for copyright infringement, the plaintiff must prove (1) ownership of the

copyright and (2) 'copying' of the protectible expression by defendant". See Sid & Marty Krofft Television Productions, Inc., v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977) citing Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976), cert. denied, 429 U.S. 980, 97 S. Ct. 492, 50 L.Ed. 2d 588 (1976); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3rd. Cir.1975), cert. denied, 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed. 2d 92 (1975); 2 M. Nimmer, Nimmer on Copyright 141 at 610 - 611 (1979) "... Because direct evidence of copying is rarely available, a plaintiff may establish copying by circumstantial evidence of (1) defendant's access to the copyrighted work prior to the creation of defendant's work, and (2) substantial similarity of both general ideas and

expression between the copyrighted work and the defendant's work. See Krofft, 562 F.2d 1156 at 1162." Baxter v. MCA, Inc., 812 F.2d 421 at 423 (9th Cir. 1987)

Thus for Judge Tang to have denied Petitioner's right to a jury trial based on Petitioner's successful proof of copyright infringement according to law is not a simple error or a matter of chance. It is a willful disregard of Petitioner's Constitutional rights.

With regard to Summary Judgment, Petitioner met all the requisites of a successful copyright infringement claim for which he has the burden of producing evidence at trial. Nowhere within the standards of Summary Judgment is Petitioner required to produce evidence regarding any defense claim. Defendants' claims about prior independent creation

are wholly improper for Summary Judgment considerations. Indeed, the law requires that Petitioner's prima facie case is to be believed and referred to the trier of fact. Yet nowhere in the Appellate ruling on this case, was the importance of this fundamental principle taken into consideration. Petitioner's case of undisputed access and substantial similarity is simply ignored by the Ninth Circuit, in denial of Due Process.

Also ignored by the Ninth Circuit is the crucial issue of undisputed common errors between the two works. The dictate of the Law is clearly spelled out by Professor Nimmer.

> "Therefore copying is ordinarily established indirectly by the plaintiff's proof of access and 'substantial' similarity...Professor Latman wisely counsels that, in the previous formulation, the term 'substantial similarity' be discarded in favor of 'probative similarity.' In other words, when

> the question is copying as a factual matter, then similarities that, in the normal course of events, would not be expected to arise independently in the two works are probative of defendant's having copied as a factual matter from Plaintiff's work. At 31.2 infra: One such example is common errors...Otherwise stated, such similarities negate defendant's claim of independent creation." (Nimmer On Copyright, Volume 3, 1993, 13.01 (B) 13-12 and 13- 13). (Appendix Pg. A-40)

By granting Defendants their argument of prior independent creation, the Ninth Circuit:

(a) disregards Petitioner's conclusive evidence under "de novo review" based on copyright priority, undisputed common errors and undisputed access combined with substantial similarities,

(b) sustains an erroneous ruling by the District Court and, in so doing

(c) takes unto itself a determination that must be left to the trier of fact, i.e. a jury.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether the judge is ruling on a motion for summary judgment or on a motion for a directed verdict." (Anderson v. Liberty Lobby, Inc., 477 US 242 at 255, 91 L.Ed 2d 202, 106 S. Ct. 2505.) "The standards of 'de novo' review are similar to that of the standards of summary judgment". (Baxter v. MCA, Inc., 812 F. 2d 421 at 423 9th Cir. [1987])

Not only is the Ninth Circuit in conflict with its own rulings in earlier cases, it is in conflict with other Appellate Courts:

> "Proof of common errors and blunders common to plaintiff's work and their

> reproduction in defendant's production creates prima facie case of infringement." Jeweler's Circular Pub. Co. v. Keystone Pub. Co. ([1922]) 281 F 83, cert. den.259 US 581, 66 L Ed 1074, 42 S.Ct. 464.)
>
> "Similarity of errors and peculiarities is strong proof of copying; reproduction of clerical and typographical errors proves piracy." Lawrence v. Dana (CC Mass) F Cas No 8136.

Significantly, Defendants copied a typographical error and one glaring factual error from Petitioner's work, and never have, nor could explain the occurrence of these common errors between the two works.

Therefore under the circumstances of the matter at bar, the issue of independent creation , as a matter of law is for a jury, the trier of fact.

In further denial of Petitioner's Due Process rights, the Ninth Circuit disregarded and refused to consider perjurious testimony by the two key

defense witnesses wherein Petitioner flagged material statements made under oath so inconsistent that each witness had to be lying at one point or another within his deposition. The putative author stated under oath that in his alleged work, an airplane which is the central plot device, can only fly at subsonic speeds. Yet in the allegedly infringing work, the same plane flies at supersonic speeds (i.e. over MACH 1). Without such high speeds, the storyline does not work. The putative author cannot, in fact, be the real author not knowing what the central plot device is within the infringing work.

The other key defense witness -- Petitioner's contact (and one of two points of "access") at Warner Bros. -- testified in deposition that he had never met Petitioner years earlier (early

1980's) in Paris, France. Yet, during discovery, the studio produced documents generated by this executive proving he had a confidential, working relationship with Petitioner which began in Paris in 1983. Furthermore, the deposition of a former, high-ranking Warner Bros. employee confirmed the above executive was Petitioner's contact and "point man" for his film project in Paris.

The Ninth Circuit reconciled these perjurious and material inconsistencies even though, "where the different parts of a witness's testimony are inconsistent, it is for the jury to reconcile the conflicting statements and determine which shall prevail." (U.S. v. Barbarra, 1971 442 F 2d 517 at 522.)

The Ninth Circuit further erred and refused to follow the law when it ruled that a newspaper article which

Defendants submitted into evidence under oath, was not an admission by a party-opponent but inadmissible hearsay. In fact, it is an admission by a party-opponent under 801 FRE (d)(2)(A) and(B) when the putative author submitted said newspaper article into evidence in his deposition to prove a material fact -- that he is the author of the allegedly infringing work. The article goes on to quote the author as stating that he found the premise of his work in effect in November 1988. This statement given to the newspaper in 1989, prior to the initiation of the lawsuit at bar, is contrary to Defendants' claim that their work was "created" (i.e. the premise) in 1986, a claim first asserted after the filing of Petitioner's lawsuit in an obvious attempt to defeat it. Indeed it is hard to reconcile Defendant

Time Warner's claim that they purchased a fully completed and final version of the allegedly infringing work in March 1987, when the author of the same work did not find the premise of it until one and a half year later in 1988.

> "Just as silence in face of accusation may constitute admission to its truth, possession of written statement becomes adoption of its contents and such statements are not hearsay and may be admitted into evidence...." U.S. v. Marino [1981] 658 F.2d 1120, 1125, Fed Rules Evid. Sec. 1386.

> "The requirement of 801(d)(2)(A), that admission be offered against party is designed to exclude introduction of self-serving statements by the party who made them, simply requires that admission at issue be contrary to party's position at trial..... (U.S. v Palow, 777 F.2d 52 [1985], 18 Fed. Rules of Evid Serv.1372. cert. den. 475 U.S. 1052 89 L.Ed.2d 585, 106 S.Ct.1277).

Accordingly, the Ninth Circuit denied Petitioner's right to the

protection and the benefit of the general law.

The Ninth Circuit also disregarded and refused to consider Petitioner's evidence showing Defendants had fabricated documentary evidence to shore up their claim of prior independent creation. Petitioner flagged the impossible nature of a banking transaction in which the putative author received a check of payment for over $60,000.00 which, according to Defendants' own records, was credited into his checking account the day before he showed up to deposit it (as the banking stamps confirmed). In a second transaction, the putative author allegedly cashed a one-month Certificate of Deposit purchased with income from the infringing work one year before he even purchased the Certificate! In

depositions, the Custodian of Records for the bank and Petitioner's own banking expert both testified that such banking transactions could not have occurred.

Under Rule 1008, Federal Rules of Evidence, Functions of Court and Jury, "When an issue is raised (a)whether an asserted writing ever existed...the issue is for the trier of fact to determine as in the cases of other issues of fact." (Emphasis added.)

The Ninth Circuit also failed to refer this question to a jury, when Petitioner properly raised the issue as to whether the disputed banking documents had even existed at the date claimed, thus further denying Petitioner his Due Process rights.

The Ninth Circuit attempted to justify its actions by ruling: "However, Fodor stipulated to the admission of

these documents (the checks and certificate of deposit) and agreed that he would not challenge their authenticity." (Appendix Pg. A-1)

Petitioner never agreed nor stipulated that the checks were authentic. That is simply not written into the stipulation. The stipulation was for the convenience of both sides, who each wished to avoid foundation issues and costs and who each wished to use said documents offensively. Furthermore, the stipulation specifically only related to documents received directly from Morgan Guarantee. All the banking documents questioned on appeal were from First Interstate Bank. But even if arguendo one reads into it what the Ninth Circuit sees, use of a stipulation for furtherance or

perpetration of fraud is not permitted under the governing Law.

> "Counsel, who has entered into a stipulation of facts to save delay, may, upon giving notice in sufficient time to prevent prejudice to the opposite party, repudiate any fact therein with respect to which the facts subsequently developed show that it was inadvertently signed." Steel Co. v. Cambria Iron Co. 22 S Ct. 698, 714, 185 U.S. 403. 46 L.Ed 968.

Petitioner's Counsel gave written notice to Defendants' Counsel within days of signing the stipulation that it was not Petitioner's intent to admit the authenticity of the banking documents but to save cost and delay by simply foundationaly stipulating that Defendants' banking documents were sent to Petitioner by Defendants' New York bank (Morgan Guarantee). In fact, from the time the banking documents were first introduced as evidence, Petitioner has always alleged that they are

fabrications for the purposes of this litigation.

Nothing on the banking documents themselves specifies that they have any real connection to the infringing work whatsoever. Nonetheless, Defendants attempted to link these bogus banking documents to the allegedly infringing work by submitting a number of other back-dated, manufactured corporate documents into evidence. One of these other fabrications is a "Request for Payment" to show that Defendants had collected royalties for the allegedly infringing work on April 23, 1987, almost two years before the work was first published -- February 1989! The list of blunders in the fabrication of Defendants' documentary evidence, is too long to list herein. However, the $60,000 check which cleared before it was

42). Disregard of the law as shown here is not the habit of this Judge.

Furthermore, Petitioner directed the Ninth Circuit's attention to Rule 406 with regard to the Judge's handwritten signature. Extensive research of the files by Petitioner's attorney could not find any other case where substantive orders and judgments were not hand-signed by this District Judge nor any other in the Central District . The fact that all substantive rulings in this case, after the 570-day delay, carry only rubber-stamped, facsimile signatures is, again, not in the routine, habit or practice of the District Judge or his Court.

Petitioner also directed the Ninth Circuit's attention to the Due Process clause of the Fifth Amendment which mandates the judiciary give opportunity

to appear and be heard to any party about to lose substantial property interests. Yet in the case at bar, wherein a rubber-stamped Order dictated Petitioner pay Defendants over $169,000.00, additional rubber-stamped Orders subsequently and persistently denied Petitioner access to an open court hearing. Petitioner has no evidence to support a claim that the District Judge routinely denies litigants their constitutionally guaranteed rights. It is more prudent to observe that his routine, habit and practice are to uphold the Constitution.

Petitioner further directed the Ninth Circuit's attention to the fact that it is not in the routine, habit or practice of a District Judge first to correctly identify triable issues of material fact and set the case for a jury

trial, then to reverse himself (on the same issues and evidence) and in so doing, decide the issues which are wholly improper under the standards of Summary Judgment.

Furthermore, Petitioner pointed out to the Ninth Circuit that the substance and style of language within the Judgment granting Defendants Summary Judgment was radically different from the Judge's previous writings in this case. Indeed, during oral argument before the Ninth Circuit, one of the Circuit Judges observed to Defendants' attorney that the language granting them Summary Judgment appeared to have been authored by a lawyer, not by a judge, commenting they were written "to the Court" not "by" the Court. The Court then asked Defense Counsel to admit whether he authored it.

Taken together, Petitioner's arguments regarding the procedural problems within the District Court, affirmatively showed, pursuant to Rule 406 and Rule 901(b)(4) of the Federal Rules of Evidence, that the District Court's Judgment and Orders are not authentic, in respect to the "de novo" review standards.

"The Authentication requirement of Rule 901 is not met where a report offered in evidence is not signed, author is unknown, and no accompanying affidavit attests to its validity." (California Pacific Bank, v. Small Business Adminstration, 1977, 557 F.2d 218, at 222). This is the exact case at bar. The Judgment and Orders are unsigned by the Judge, the Author is unknown, and there is no affidavit of any sort in support of

the authenticity of these documents. Nor has the Court corrected this in its many opportunities to do so.

For the Ninth Circuit to have ruled, "Fodor provided no evidence that the District Court orders are not authentic" is in deliberate disregard of the evidence and the governing law. By so ruling, it has tolerated fraud upon the District Court which is wholly inconsistent with "the good order of society."

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." (Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944) 322 U.S. 238, 246, 64 S Ct 997, 88 L.Ed 1250)

Under the standards of "de novo" review, the Ninth Circuit should have

referred Petitioner's evidence of inauthenticity to the trier of fact. "And certainly an issue of such importance affecting the validity of a judgment should never be tried on affidavits." (Hazel-Atlas Glass Co. v. Hartford Empire Co., supra, at 270).

> "The Federal Judiciary was..designed by the framers to stand independent ...to maintain the checks and balances of the constitutional structure, and also to guarantee the process of adjudication itself remained impartial." (Northern Pipeline Co. v. Marathon Pipe Line Col. 458 US 50, 58, 73 L. Ed. 2d 598)

Article III of the U.S. Constitution benefits the Public with an independent Federal Judiciary so as to protect that Public from the potential "tyranny of government." But if the extent of some Federal Judges' independence is such that they are unable or unwilling to protect even one individual from the

tyranny of a corrupt and powerful litigant -- Time Warner-- which successfully used federal judicial power for denial of due Process, obstruction of justice and extortion of its opponent, then the benefit of their independence is lost, for all practical purposes, to the Public. To let the foregoing be the final outcome of the instant matter will erode the Public's confidence in the independence and integrity of the Federal Judiciary.

CONCLUSION

It is respectfully prayed that the Supreme Court recognize the special and important reasons set forth above to grant this Petition for Writ of

deposited and the certificate of deposit that was cashed in one year before it was even in existence, are more than enough to create a triable issue of fact here.

In granting Defendants their argument of prior independent creation, the Ninth Circuit Court of Appeals has consistently denied Petitioner any Due Process. Petitioner has produced a strong case of Copyright Infringement based on a valid Copyright, undisputed access, substantial similarities, undisputed common errors, and a myriad of proof of fraudulent documentary and testimonial evidence generated by Defendants to support a false claim of prior independent creation. Yet the Ninth Circuit has failed to follow the Law, disregarding almost all of Petitioner's argument and law and failing to grant him the jury trial guaranteed by

the Fifth Amendment of the U.S. Constitution and so sorely needed to resolve the many serious questions raised in this litigation.

> "Interest in copyright is a property right protected by this clause (Due Process) and the just compensation for property clause of this amendment (Fifth Amendment)." (Roth v. Pritikin [1983] 710 F 2d. 934, 939).
>
> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial so that every citizen shall hold his life, liberty, and property and immunities under the protection of the general rules which govern society." Truax et al v. Corrigan, et al. 42 Sup. Ct. 124 at 129. citing Hurtado v. California, 110 U.S. 516, 535, 4 Sup Ct. 1111, 28 L.Ed. 232.
>
> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law." Id.

By its rulings in this case, the Ninth Circuit Court of Appeals has refused to follow this fundamental principle.

In so denying Petitioner, The Ninth Circuit has also created numerous conflicts of opinion and authorities within its own jurisdiction and between the Circuit and other Courts of Appeal. Such conflicts can only be resolved by this Court.

III. PETITIONER CLAIMS THAT IT IS DENIAL OF DUE PROCESS TO AFFIRM A DISTRICT COURT'S JUDGMENT AND ORDERS WHICH HE HAS SHOWN TO BE THE PRODUCT OF FRAUD UPON THE COURT BY DEFENDANTS TIME WARNER ET AL. PETITIONER ALSO CLAIMS THAT IN AFFIRMING SUCH BOGUS RULINGS, THE NINTH CIRCUIT COURT OF APPEALS HAS GREATLY ERODED THE PUBLIC'S CONFIDENCE IN THE INDEPENDENCE OF THE FEDERAL JUDICIARY.

In rejecting Petitioner's arguments, the Ninth Circuit astonishingly ruled, in its unpublished Memorandum: "Fodor

provided no evidence that the District Court orders are not authentic." (Appendix Pg. A-1)

Yet, Petitioner's Opening Brief filed with the Ninth Circuit and his evidence reviewed during oral argument before the Appellate Court proved, under the standard of "de novo" review wherein Petitioner's evidence is to be believed and taken in the light most favorable to him, that the Judgment and Orders appealed were not decided by the District Judge. The required attestation and authentication of said documents were apparently secured by the fraudulent use of the District Judge's rubber-stamped, facsimile handwritten signature in conspiracy between Defendants and the Judge's Clerk(s). The argument set forth by Petitioner is as follows:

> "Proof that a party knew that he could not alone accomplish an unlawful object permits the inference of a conspiracy between the party and those persons foreseeably required to affect the object whether or not the party knows the identity or specific activities of the others". (U.S. v. Fernandez 892 F.2d 976, at 988. Cert. Dism.; Reckarey v. U.S. 495 U.S. 944)

In January 1991, Defendants Time Warner Inc. et al. sustained a serious setback when the District Judge denied their first Motion for Summary Judgment, finding both access and substantial similarities along with the ownership of a valid copyright which had been stipulated to. The District Judge set trial for September 1991.

At that time, Defendants apparently knew they could not obtain a lawful dismissal of the case before trial. They also knew that to obtain an unlawful dismissal of the case, they could not act

alone. Thus it is permissible to presume a conspiracy ensued between Defendants and the District Judge's Clerk(s) who control the Judge's facsimile rubber stamp signature, and are also in a position to file Orders and Judgments into the Court's record that are not decided by a Judge. Taking advantage of the Clerk's/ Clerks' position, Defendants -- over a two-year period -- apparently not only authored decisions favorable to themselves but also attempted to authenticate them with use of a forged signature, obtaining Summary Judgment (Appendix pg. A-17) plus massive attorneys' fees (Appendix pg. A-31) and also successfully blocking Petitioner from any opportunity to appear and be heard in open court.

Petitioner directed the Ninth Circuit's attention to Rule 406 of The

Federal Rules of Evidence: Habit, Routine, and Practice to compare the overall record of the District Judge with some of the specific anomalies in the case at bar which showed, with highly probative evidence, fraud upon the District Court.

According to The Almanac of the Federal Judiciary ,1992 Volume I, page 52, the District Judge's work habits are described as follows: "There's no wasted motion. His rulings are quick"; "He's able to handle a large number of cases expeditiously." Yet in this case, Defendants moved for Reconsideration of the Summary Judgment on January 9, 1991, with Granting of Summary Judgment reached August 31, 1992, some 570 days after submission of the Motion. The law requires the judge to decide a motion within 120 days (Local Rule 3, Appen.

Certiorari pursuant to Rule 10 of the Supreme Court Rules.

Petitioner showed that the decision of the Ninth Circuit Court of Appeals is in embarrassing conflict of opinion and authority with other U.S. Courts of Appeal on the same matters, that this case involves principles the settlement of which is important to the public interest, and that the District Court as well as the Ninth Circuit Court of Appeals has departed so far from the accepted and usual course of judicial proceeding that their actions constitute denial of Due Process for Petitioner as guaranteed by the Fifth Amendment. All the above call for the exercise of the Supreme Court's power of supervision.

For the foregoing reasons, the Petitioner respectfully prays that his

Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LAW OFFICES OF MELVIN M. BELLI

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APPENDIX

LIST OF APPENDIX

Page

Memorandum of the Ninth Circuit Court of Appeals A1

District Court's Order Denying Defendant's Motion for Summary Judgment A20

District Court's Order Granting Defendant's Motion for Summary Judgment A26

District Court's Order Granting Attorney's Fees A40

Order of the Ninth Circuit court of Appeals Denying Petition for Rehearing and Rejection of Rehearing En Banc A43

Constitutional Provisions A45

United States Statutes A47

Treatises A50

Local Rules of the Central District of California A52

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GYORGY FODOR, FILED 3-2-94

Plaintiff-Appellant,

vs.

TIME WARNER, INC.; WARNER
COMMUNICATIONS CO.; WARNER BOOKS
INC.; DENNIS ANDERSON; WARNER
BROS., INC.

Defendants-Appellees.

NO. 92-56169, 92-56454
D.C. NO. CV-90-2203-JMI

MEMORANDUM

Appeal From The United States District Court For The Central District Of California James M. Ideman, District Judge, Presiding

Argued And Submitted February 2, 1994
Pasadena, California

BEFORE: TANG, PREGERSON, and NOONAN, Circuit Judges.

Plaintiff Gyorgy Fodor filed a copyright action contending that defendants Dennis Anderson, Warner Books, Inc., Time Warner Inc., and Warner Communications Inc. (collectively, "Warner"), infringed his copyright in a screenplay entitled Stealth by writing and publishing the book Target Stealth. The district court also granted substantial attorney's fees to Warner for Fodor's bad faith denial of the authenticity of documents proving prior independent creation. Fodor appeals both the summary judgment and the award of attorney's fees.

BACKGROUND

Gyorgy Fodor wrote a screenplay about the Stealth bomber entitled Stealth. The screenplay was copyrighted on October 17, 1987. On February 22, 1988, Fodor submitted the screenplay to Wayne Duband, President of Warner Bros., with whom he had previously done business. It is undisputed that Warner did not have access to the screenplay prior to this date. Warner apparently did not respond to the submission, and Fodor's attempts to finance the project elsewhere were unsuccessful due to the recent publication of the book Target Stealth, which appeared to be the novelization of Fodor's screenplay.

Fodor filed his copyright infringement action in May 1990. Warner's first motion for summary judgment was denied on the basis that there was a genuine issue of material fact whether the

screenplay Stealth and the book Target Stealth were substantially similar. While the district court recognized that Warner contended that it had no access to the screenplay until the book was already written, the court did not resolve this issue.

Warner thus moved for reconsideration of the denial of summary judgment, urging the district court to consider the prior independent creation issue. Warner presented evidence that Dennis Anderson wrote Target Stealth in 1986, and in January and February 1987, submitted the manuscript to James O'Shea Wade at Crown Publisher's, Patricia Soliman at Simon and Schuster, and Nansey Neiman at Warner Books. On February 24, 1987, Warner agreed to publish the book and prepared a "Contract Deal Memo" in which Anderson would be paid a $150,000 advance (one-half

upon signing the contract and one-half upon delivery and acceptance of the revised manuscript). Another check for $75,000, minus expenses and commission, was sent to Anderson on January 14, 1988.

Thereafter, Anderson's manuscript was edited by Charles Conrad at Warner Books. In response, Anderson twice revised his manuscript and sent revisions to Conrad on August 17, 1987 and October 27, 1987, after which Warner contends the book was essentially complete. The editing process continued into 1988, and Target Stealth was typeset and page proofs printed in May 1988. The hard cover version was published in February, 1989.

DISCUSSION

I.

"To establish infringement, two elements must be proven: (1) ownership of a valid copyright,[1] and (2) copying of constituent elements of the work that are original." Feist Publications, inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S. Ct. 1282, 1296 (1991) (citation omitted). Because there is rarely direct evidence of copying, a finding of copying "typically depends on proof of access and probative similarity." Nimmer on Copyright, § 13.01B, at 13-13 (1993). Even if two works are substantially similar, however, there is no infringement liability if the challenged work was independently created. Id.

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[1] Warner did not dispute for purposes of the summary judgment motion that Fodor owns a valid copyright on the screenplay Stealth. Indeed, a copyright registration certificate creates a prima facie presumption that the copyright is valid. see Nimmer on Copyright, § 12.11 [B], at 12-161 (1993).

It is undisputed that Warner had access to Fodor's screenplay in February, 1988. Fodor raises a number of issues which he claims create a genuine issue of material fact regarding whether Target Stealth was in fact created prior to Warner's access to his screenplay.

Fodor first argues that common errors in the two works establish a prima facie case of copying. See Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485, 492 (9th Cir. 1985) ("courts have regarded the existence of common errors...as the strongest evidence of piracy, but proof of common errors does not obviate the need for proving substantial similarity."); Nimmer, § 13-01 [B], at 13-12-13-13. However, if Warner did not have access to the screenplay prior to the writing of Target Stealth, even striking similarities between the two

works must be deemed fortuitous. See Feist, 111 S. Ct. at 1287 ("a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.")

Fodor next argues that Target Stealth was not created prior to his screenplay because its copyright registration form, dated February 7, 1989, states that "creation...was completed" in 1988. The Copyright Office Form TX, which provides instructions on completing the copyright registration form, explains that the form means by "creation" under the statute:

> [A] work is "created" when it is fixed in a copy or phonorecord for the first time . Where a work has been prepared over period of time , the part of the work existing in fixed form on a particular date constitutes the created work on that

[illegible]

[illegible]

[illegible]

> date . The date you give here should be the year in which the author completed the particular version for which registration is now being sought, even if other versions exist or if further changes or auditions are planned.

Nimmer, § 21.02, at 21-6 (emphasis added). The version of Target Stealth for which Anderson sought registration was completed in 1988, and the copyright registration date is consistent with Warner's other evidence.

Fodor additionally argues that Dennis Anderson gave a statement to the press that he received the premise for his book in November 1988. However, there is no evidence that Anderson manifested his agreement with the article, and it therefore does not qualify as a party-opponent admission under Fed. R. Evid. 801

(d) (2). The article is otherwise inadmissible hearsay.

Fodor next turns to Anderson's alleged admission at deposition that he relied on 1988 reference material in preparing his manuscript. This deposition testimony reveals that the reference book had an original copyright date of 1975; it was not clarified in the deposition whether Anderson used only the 1988 version or had possessed the 1975 version as well. Further, the 1988 "completion" date on the copyright registration is consistent with Anderson's testimony that he used the 1988 version for reference.

Fodor also challenged the authenticity of certain banking documents produced by Warner to establish that Anderson had been paid for Target Stealth prior to the date of access to Fodor's screenplay. However, Fodor stipulated to

the admission of these documents, and agreed that he would not challenge their authenticity. Although Fodor argues that the stipulation was entered into "for the convenience of counsel" to allow Morgan Guarantee documents to be admitted without the testimony of a custodian of records, the stipulation is clearly not so limited in scope.

More importantly, while there may have been some grounds on which to challenge the authenticity of these documents[2] , Warner produced other,

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[2] Fodor claims that a check dated January 14, 1988, in the amount of $63,694.06, has altered dates of deposit. The deposit slip bears the handwritten deposit date of "1/20/88", as does the mechanical notation on the slip from the bank machine. On the back of the check and deposit slip, however, there is a "Pay any Bank" stamp dated January 19, 1988, which is affixed after deposit. Fodor thus claims the date of deposit must have been altered because it is impossible that the check could have been cleared the day before the deposit.

Fodor also points to a Certificate of Deposit issued to Anderson and his wife, dated April 28, 1987 with a maturity date of May 29, 1987. The CD is stamped "Paid May 29, 1986." Fodor also claims that a second CD for $24,000

unchallenged, documents establishing prior independent creation, including the "Request for Payment" for the first installment of the advance, dated April 16, 1987, tax documentation reflecting the April transaction, and contracts and agreements memorializing the negotiations and revisions of the book. The inconsistencies in the banking documents, produced directly by the banks, are better explained by mistakes made by the banks. In view of the other unchallenged evidence introduced by Warner, these inconsistencies, alone, do not defeat summary judgment

Warner also introduced affidavits from other publishers stating that they had reviewed Target Stealth in 1987. Fodor witnesses were interested parties.

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stamped "June 30" was altered by hand to date "June 29" and then marked "Pais" in handwriting.

This argument was not raised in the district court, and will not be considered by this court.

Moreover, Fodor's argument that the testimony of Wayne Duband and Dennis Anderson produce a "consistent pattern of perjury," is not supported by the record. Although credibility determinations and the drawing of inferences are for the jury, Anderson v. Liberty Lobby, 477 U.S.242, 255 (1986), the substance of the testimony and the extensive documentary evidence was otherwise undisputed by Fodor. Fodor cannot create an issue of material fact merely by casting aspersions on the declarants.

Rule 56(e) provides that a party opposing a motion for summary judgment may not rest upon the allegations or denials in the pleadings, but must "set forth specific facts showing that there is a

genuine issue for trial." A court "must resolve any factual issues of controversy in favor of the non-moving party only in the sense that, where the facts specifically averred by the movant, the motion must be denied." Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (190).

In granting summary judgment for Warner, the district court held that "undisputed and overwhelming" evidence supported the independent creation of Target Stealth. Fodor has not introduced facts which contradict the substantial evidence introduced by Warner to establish prior independent creation. The district court's summary judgment is affirmed[3] .

II.

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[3] A district court's grant of summary judgment is reviewed de novo. Baxter v. MCA, Inc., 812 F. 2d 421, 423 (9th Cir.), cert. denied 484 U.S. 954 (1987).

As there is no issue of material fact Duband had access to Fodor's screenplay prior to the writing and essential completion of Target Stealth, there is no basis on which to find that Duband violated a confidential relationship with Fodor nor that Warner engaged in unfair competition. The district court's dismissal of Fodor's state law claims is affirmed.

III.

Fodor urges this court to reverse unsigned orders citing Daniels v. Stover, 660 F. Supp. 301, 303-04 (S.D. Tex. 1987), in which the district court held that a state judge was not shielded in a § 1983 case by judicial immunity where the challenged acts (mental health warrants)

were rubber stamped by a clerk outside of the presence of the judge, and Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1224 (E.D. Pa. 1980), which holds that a signature affixed by rubber stamp which corresponds to usual practice may authenticate a document. Neither case helps Fodor. Fodor provided no evidence that the district court orders are not authentic. This claim is rejected.

IV.

Warner served Requests for Admission, requesting Fodor to admit the truth of certain facts and the authenticity of documents which established that Target Stealth was written in 1986 and sold to Warner in 1987. Fodor denied the authenticity of all the documents offered

by Warner, on the basis that the alleged non-authentic documents raised an issue that all of the documents had been altered or manufactured.

The district court found that Fodor had denied Warner's requests in bad faith in violation of Fed. R. Civ. P. 37 (c), and ordered to pay Warner $169,587.50 in attorney's fees for Warner's "costs of proving the truth of the facts and genuineness of documents pursuant to Fed.R. Civ. P. 37(c)." [ER 19-20.] The district court's award of attorney's fees is reviewed for an abuse of discretion. Holmgren v. State Farm Mut. Auto Ins., 976 F. 2d 573, 581 (9th Cir. 1992).

Upon review, Fodor appears to have had a colorable claim that he denied the authenticity of some of the banking documents in good faith, based on the opinion of his expert, Dr. Crown. Because

the district court did not make any findings to support its conclusion of bad faith, we must vacate the award and remand for reconsideration. "In order to facilitate appellate review, the district court must clearly articulate sound reasons in support of its fee award." Intel Corp. v. Terabyte intern., Inc., 6 F.3d 614, 622 (9th Cir.1993). As Intel, the district court in this case "merely awarded the fees without elaboration. Such a procedure is inadequate." Id.

Moreover, we remand the attorney's fees award for reconsideration of the amount awarded. "Although the district court has wide discretion to fix the amount of a Rule 37 award" on remand, "the rule provides that such an award must be 'reasonable'." Holmgren, 976 F. 2d at 581. The attorney's fees awarded under

Rule 37 must be related to proving the authenticity of documents.

JUDGMENT AFFIRMED (No. 92-56169); ATTORNEY'S FEES AWARD VACATED AND REMANDED FOR RECONSIDERATION (No. 92-56454). EACH PARTY SHALL BEAR ITS OWN COSTS ON APPEAL.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GYORGY FODOR, FILED 1-3-91

Plaintiff(s),

vs.

TIME WARNER, INC., et al.,

Defendant(s).

_______________________________/

CV-90-2203-JMI (Kx)

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

IT IS HEREBY ORDERED:

1. Defendant's motion for summary judgment is hereby DENIED.

2. Defendant contends that they had no access to Plaintiff's play until "TARGET STEALTH" was already written. Defendant further contends that the two works are not substantially similar.

3. Rule 56 of the Federal Rules of Civil Procedure permits summary judgment to be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To withstand a motion for summary judgment, the non-moving party must show the existence of genuine factual issues which can be properly resolved only by a finder of fact because the issue may be reasonably resolved in favor of either party. Id.

4. Summary judgment is "not highly favored on questions of substantial similarity in copyright cases ..." Narell v. Freeman, 872 F. 2d. 907, 909-910 (9th Cir. 1989). However, "summary judgment is appropriate if the court can conclude, after viewing the evidence and drawing

inference in a manner most favorable to the non-moving party, that no reasonable juror could find substantial similarity of ideas and expression." Ibid.

5. The Ninth Circuit uses a two-part test to determine if works are substantially similar: an extrinsic and intrinsic test. "The extrinsic test determines whether the two works are substantially similar in general ideas and compares the individual features of the works to find specific similarities between the plot, theme, dialogue, mood setting, pace, characters, and sequence of events." Narell, supra, at 912.

6. The intrinsic test determines "whether the forms of expression of the two works are substantially similar; it is subjective, depending on the response of an ordinary, reasonable reader...To constitute infringment, the total concept

and feel of the works must be substantially similar." Narell, supra, at 913 (citations omitted).

The Court DENIES the motion for summary judgment. Although there are differences in the two works, there are also enough substantial similarities to withstand a summary judgment motion.

The general ideas of the two works resemble each other greatly. For example, the heroes in both works are ace pilots who singlehandedly save the world from destruction. The mood of the two works is one of action and thrills, even though there is more violence in "Stealth" than "Target Stealth". The basic features of the two works are that Iranian terrorists steal the Stealth bomber, hoping to set off an international incident between the U.S. and the U.S.S.R. In both works, the hero has a friend who turns traitor

because his family is threatened by the Iranian terrorists. Both friends die, after having redeemed himself in the fray. However, the hero saves the day and all is well.

Further, the concept and feel of the works is substantially similar. "Target Stealth" is a finished book, not a first draft play, as is "Stealth", and has more developed characters and subplots. However, the basic concept of the two works seems similar enough that this Court is not be prepared to state as a matter of law tthat no two jurors could reasonably conclude that the two works were not substantially similar in concept and feel.

Therefore, this Court DENIES the motion for summary judgment.

IT IS SO ORDERED.

DATED:______________________

____
JAMES M. IDEMAN
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GYORGY FODOR, FILED 8-31-92

Plaintiff(s),

vs.

TIME WARNER, INC., et al.,

Defendant(s).

_______________________________/

CV-90-2203-JMI (Kx)

ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

IT IS HEREBY ORDERED:

1. Defendants TIME WARNER, INC., et al's (hereinafter "Defendants") motion for reconsideration or, in the alternative clarification of the Court's January 2, 1991 Order denying Defendants' motion for summary judgment is hereby GRANTED. For the reasons set forth below, Defendants'

motion for summary judgment is also GRANTED.

2. Before the Court is Defendants' motion for reconsideration/clarification of this Court's Order denying Defendants' motion for summary judgment. This lawsuit involves Defendants' alleged infringment of PLAINTIFF GYORGY FODOR'S (hereinafter "PLAINTIFF") copyrighted play "Stealth". In its earlier Order, this Court held that numerous issues of material fact existed regarding whether Defendants' novel "Target Stealth" was "substantially similar" to Plaintiff's work.

3. By their motion, Defendants seek clarification of three arguments: (1) whether a genuine issue of material fact exists regarding Defendants' prior creation; (2) ahether a genuine issue of material fact exists regarding the lack of a confidential relationship between

Plaintiff and Defendants; and (3) whether a genuine issue of material fact exists regarding Defendants Warner Bros. and Time Warner's involvment--or lack thereof--with Plaintiff.

4. Plaintiff GYORGY FODOR alleges he sent a manuscript for his play, Stealth, to Defendant TIME WARNER in February 1988. Plaintiff copyrighted his play in October 1987. Plaintiff aleeges that the Defendant copyrighted a book, Target Stealth, in February 1988, written by Jack Merek (a pseudonym for Dennis Anderson), which is substantially similar to his own play and thereby an infringment of Plaintiff's copyright.

5. As stated in this Court's earlier Order, summary judgment under Fed. R. Civ. P. 56 is appropriate only if all the evidence in the case indicates that "there in no genuine issue as to any

material fact and that the moving party is entitled to summary judgment as a matter of law". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). This Court's duty is "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F. 2d 626, 631 (9th Cir. 1987) (citation) (affirming summary judgment for defendants).

A. Prior Creation.

Defendants first assert that no genuine issue of material fact exists regarding the independant creation of the work "Target: Stealth." See Meta-Film Associates, Inc. v. Mca, Inc., 586 F.

Supp. 1346, 1359 (C.D. Cal. 1984) (where defendant's work was written before plaintiff's, there was no opportunity to copy). Specifically, defendants argue that defendant/author Dennis Anderson wrote the allegedly infringing work, "Target Stealth" in 1986 and, following its purchase by Defendant Warner Books, Inc. ("Warner Books"), revised it during the course of 1987. Plaintiff, by his own admission, did not submit his work until February 1988, by which time only minor changes were being made in "Target Stealth." This undisputed chain of events, Defendants argue, entitles them to summary judgment.

This Court's review of record shows that the evidence supporting the independent creation of "Target Stealth" is both undisputed and overwhelming. The uncontradicted testimony shows that

Defendant/author Dennis Anderson wrote "Target:Stealth" during 1986 and then mailed it to Clyde Taylor, an agent at Curtis-Brown, Ltd. ("Curtis-Brown"), in December of that year. The uncontradicted testimony further indicates that on January 28, 1987, a Memorandum of Agreement was signed by Anderson and Curtis, Brown for the marketing of that novel and that in February 1987, the novel was purchased by Warner Books for $150,000.[1] The $150,000 purchase price was payable half on signing of the contract and half on delivery and acceptance of the revised manuscript.

In terms of revisions, the uncontradicted testimony indicates that the novel was first revised between May 1987 and August 1987, with another

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[1] Defendants have also submitted undisputed declarations from other publishers, all of whom recieved copies of "Target: Stealth" in January 1987.

revision occurring between September and October of that year.[2] Minor copy-editing changes were made in early 1988, with the final page-proofs being approved in June 1988. All of the individuals involved in this process have testified that at no time were they even aware of Plaintiff's work.

The physical documents accompanying Defendants' undisputed testimony-although surplusage in the Court's view--are equally compelling. In its motion for summary judgment, Defendants have submitted the initial check representing the $75,000 advance from Warner Books, as well as subsequent tax documentation reflecting this transaction. Defendants have also submitted the various contracts entered into between the parties

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[2] The Court's review of these revisions indicate that while substantial, none of them altered the central premise or major chapters of the book. See Exhibits 26, 34, 45-6, 52, and 55.

[illegible]

[illegible]

reflecting the title of the book, its plot lines, etc.[3] Finally, every stage of the negotiations and revisions of the book "Target: Stealth" was memorialized by the parties.[4] All of these documents reflect that "Target: Stealth" was marketed and purchased over a year before Plaintiff submitted his work to Warner Books.

In response to this overwhelming evidence, Plaintiff raises a number of feeble arguments, none of which create a genuine issue of material fact. First

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[3] All of these documents are admissible under the Business Records exception to the hearsay rule. See Fed. R. Evid. 803 (6). The Court also believes that this evidence is admissible under the so-called "catch-all" exception to the hearsay rule. See Fed. R. Civ. P. 803(24).

[4] These documents are admissible under a variety of theories. First, they all establish the state of mind of the various parties (i.e. what they were doing and why they did it). Second, the Court also believes that the business correspondence, particularly those involving revisions, qualify as business records since they were developed in the ordinary course of Curtis, Brown's and Warner Books' respective operations. Third, and finally, the Court believes that all of these documents are admissible under the Catch-all exception to the hearsay rule. See Fed. R. Civ. P. 803 (24).

Plaintiff asserts that the copyright registration for "Target:Stealth" states that the book was completed in 1988 and that this contradicts Defendants' sworn declarations. In fact, the oppostie is true: Defendants all testified that the minor revisions of the work were not completed until June 1988. As such, the registration form is entirely consistent with the testimony before the Court[5]

Plaintiff next points to two isolated pages of defendants' draft copy which have the word "Gambit" in the upper left-hand corner. Based upon these two pages (of a multi-hundred page book), Plaintiff speculates that the "real" title of "Target:Stealth" was "Gambit".[6]

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[5] Moreover, this is also consistent with Anderson's testimony that he used a book which was revised in 1988 as a reference work.

[6] It is worth noting the word "Gambit" in both instances was neither underlined, bolded, or placed at the top, centermost portion of the page. The draft copy also indicates that it was deleted.

[illegible]

[illegible]

[illegible]

Accordingly, Plaintiff argues, these two pages create an inference that all of the evidence referring to the work as "Target: Stealth" is fraudulent.

This fanciful construction is simply not a reasonable inference to be drawn from the evidence: all of the evidence in this case, including the contract signed between the parties and the title page of the draft itself, show the title of Anderson's work has always been "Target:Stealth". Two deleted words on two pages will not suffice to create a genuine issue of material fact here.

Plaintiff next contends that since Anderson refers to the Stealth bomber as a "subsonic" plane and later describes it as flying at Mach 2 (two statements which are inconsistent), Anderson clearly did not write the book and is lying. Again, this

is not a reasonable inference and the Court should reject it.

Finally, plaintiff contests the various documentation before the Court. As first order matter, the Court notes that even were this evidence not considered, the undisputed testimony alone in this action mandates the granting of summary judgment. Turning to Plaintiff's specific claims, Plaintiff's attorneys contend that their review of the various documents reflecting the 1987 purchase of "Target: Stealth" are non-authentic. The Court rejects their observations for three reasons. First, on ther face, the proferred arguments are frivolous. Second, neither of Plaintiff's attorneys is qualified as an expert to testify regarding authentification. Third, as to the bank documents at issue here, Plaintiff specifically stipulated to their

admittance.[7] The best argument Plaintiff could raise, which he does not, is that "Target: Syealth" was substantially rewritten following the submission of his novel. This claim, however, is totally belied by the undisputed testimony before the Court. It is also belied by the February, 1987 purchase contract between Warner Books and Curtis, Brown. That document describes in detail the plot of the book "Target: Stealth" and clearly shows that the book as purchased in early 1987 was essentially identical to the allegedly infringing work published in February 1989. *See* Exhibit 144.

For all these reasons, Defendants' motion as to this issue is hereby GRANTED,

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[7] Plaintiff also proferred the unsworn testimony of a purported "expert," Paul Weast, raising these same issues. The Court rejects this testimony on two grounds. First, the absence of a declaration under oath precludes this Court from considering it. *See* Fed. R. Civ. P. 56 (c). Second, even were this Court to consider it, Mr. Weast is not qualified as an expert to testify. *See* Fed. R. Civ. P. 702.

[illegible]

[illegible]

as Defendants' motion for summary judgment. This claim is therefore DISMISSED WITH PREJUDICE.

B. Confidential Relationship.

In light of a ruling that "Target: Stealth" was created independently, no claim for breach of confidential relationship can stand. See Donahue v. Ziv Television Programs, Inc., 245 Cal. App. 2d 593, 54 Cal. Rptr. 130, 132 (1966). Accordingly, this claim is also DISMISSED WITH PREJUDICE.

For the foregoing reasons, Defendants' motion for reconsideration is GRANTED, as is Defendants' motion for summary judgment. Accordingly, Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED:______________________

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JAMES M. IDEMAN
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GYORGY FODOR, FILED 11-9-92

Plaintiff(s),

vs.

TIME WARNER, INC., et al.,

Defendant(s).

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CV-90-2203-JMI (Kx)

ORDER GRANTING ATTORNEYS' FEES

IT IS ORDERED:

1. The motion of Warner Bros. Inc., Time Warner Inc., Warner Communications Inc., Warner Books, Inc. and Dennis Anderson ("defendants") for attorneys' fees came on for hearing before this Court on October 26, 1992 at 10:00 a.m. The Court having read and considered defendants' motion, plaintiff's opposition thereto, defendants' reply, and all

supporting documents submitted therewith hereby GRANTS defendants' motion on the following grounds:

2. The Court finds that defendants made and served requests for admissions of facts and genuineness of documents pursuant to Fed. R. Civ. P. 36. Plaintiff denied defendants' requests and such denial was not made in good faith. Accordingly, this Court orders that plaintiff Gyorgy Fodor pay to defendants their attorneys' fees in the amount of $169,587.50 as defendants' costs of proving the truth of the facts and genuineness of documents pursuant to Fed. R. Civ. P. 37(c).

IT IS SO ORDERED.

DATED:______________________

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JAMES M. IDEMAN
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GYORGY FODOR FILED: 04-21-94

Plaintiff-Appellant,

vs.

TIME WARNER, INC.; WARNER
COMMUNICATIONS CO.; WARNER BOOKS
INC.; DENNIS ANDERSON; WARNER BROS.,
INC.,

Defendants-Appellees.

____/

NOS. 92-56169, 92-56454
D.C. No. CV-90-2203-JMI

ORDER

BEFORE: TANG, PREGERSON, and NOONAN,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and

no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CONSTITUTION PROVISIONS

Article I

Sec. 8 [Powers of Congress.]

[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Article III

Section 1. Supreme Court and inferior courts--Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not

be diminished during their Continuance in Office.

Amendment V

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentement or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S STATUTES

§ 101. Definitions

17 USC 101

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

[illegible]

[illegible]

[illegible]

[illegible]

A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title [17 USCS §§ 101 et seq.] if a fixation of the work is being made simultaneously with its transmission.

§ 410. Registration of claim and issuance of certificate

17 USC 410

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

§ 501. Infringement of copyright

17 USC 501

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 [17 USCS §§ 106-118], or who imports copies or phonorecords into the United States in violation of section 602 [17 USCS § 602], is an infringer of the copyright.

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§13.01[B]

Therefore copying is ordinarily established indirectly by the plaintiff's proof of access and "substantial" similarity. The nature of these elements is considered in subsequent sections. Professor Latman wisely counsels that, in the previous formulation, the term "substantial similarity" be discarded in favor of "probative similarity". In other words, when the question is copying as a factual matter, then similarities that, in the normal course of events, would not be expected to arise independently in the two works are probative of defendant's having copied as a factual matter from plaintiff's work.[31.2] Otherwise stated,

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[31.2] One such example is common errors. See§13.03[C]*infra*.

such similarities negative defendant's claim of independent creation.[31.3]

[31.3] Latman, *op cit.* N. 31.1 *supra*, at 1189 ("Thus, 'copying' in the first instance is the obverse of independent creation")

11.1.2 *Application for Continuance-Approval of the Court.* No continuance (whether stipulated to by counsel or not) shall be effective unless announced in open court or approved in writing by the judge.

RULE 32. TIME LIMITS FOR DECISIONS BY COURT

If the Court shall not:

(1) as to any motion as defined in Rule 1.3 or Rule 7 hereof, render its decision within one-hundred and twenty (120) days after the matter has been submitted to the Court, or